Supreme Court, U.S.
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No. 94-236

In The

Supreme Court of the United States

October Term, 1994

In re Petition of
JOHN and JANE DOE, Husband and Wife,
to Adopt BABY BOY JANIKOVA,
a minor, by his guardian ad litem,
Edward J. O'Connell,

Petitioners,

OTAKAR KIRCHNER,
Father of Baby Boy Janikova,

Respondent.

Petition For Writ Of Certiorari To The Illinois Supreme Court

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

750 ILCS 50/1(D)(1) 2, 4

750 ILCS 50/1(D)(n)(2)(i) 4

Lehr v. Robertson, 463 U.S. 248 (1983) 3, 4, 6

Stanley v. Illinois, 405 U.S. 645 (1972)..... 4, 5, 6

On September 6, 1994, the Governor of the State of Illinois, Jim Edgar, filed a brief *Amicus Curiae* in support of the Petition for Certiorari. Because the *Amicus* Brief was unavailable to him at the time he filed his Brief in Opposition to Certiorari, Respondent submits this Supplemental Brief pursuant to Supreme Court Rule 15.7, noting the following deficiencies in the arguments of the *Amicus* Brief and significant misrepresentations of the decision below.

ARGUMENT

1. Like Petitioners, Mr. Edgar raises no federal issue appropriate for review by this Court. Respondent has already argued in answer to the Petition for Certiorari that neither the record nor the decision of the Illinois Supreme Court presents any federal question which this Court would have jurisdiction to review, and that in any event the decision below is fully consistent with the precedent of this Court and other courts interpreting the scope of constitutional protections for familial relationships. Each of Respondent's arguments applies with equal force to the contentions of Mr. Edgar in his *Amicus* Brief, which reflect the same confusion between issues of state law and policy and federal issues appropriate for review by this Court evidenced by the Petition. As anticipated, Mr. Edgar's *Amicus* Brief at most raises a concern over the proper interpretation of state law by the state courts that is clearly an inappropriate subject for review here, for reasons explained more fully in Respondent's Brief in Opposition to Certiorari.

2. Mr. Edgar argues that in concluding Mr. Kirchner was fit, the Illinois Supreme Court has adopted a rule of law that has "eviscerated" the "bright line" test described by the applicable section of the Illinois Adoption Act, 750 ILCS 50/1(D)(1), and has given to unwed fathers "an open-ended opportunity" to challenge an adoption, measured from the time that a father discovers his child has been placed for adoption. *Amicus* Brief at 4. This rule, he concludes, "sets the stage for a cruel and lengthy uncertainty for all parties to an adoption." *Id.* at 5.[1] This hyperbolic conclusion is based on both a misunderstanding of the factual basis of the decision below, and on an inapt analogy between the statutory definition of unfitness at issue here and the type of bright-line measure of a father's interest embodied in statutes establishing paternity registries.

a. The implicit and mistaken factual assumption underlying Mr. Edgar's depiction of the ruling below is that there was no evidence supporting the finding of fitness based on Mr. Kirchner's conduct during the first thirty days of his son's life, as required by section (D)(1), and that the judgment of his fitness must therefore have rested on his actions after learning that his son had been placed for adoption, 57 days after his birth. However, the Illinois Supreme Court, in finding Mr. Kirchner fit, relied

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[1] Mr. Edgar contends similarly that the court sets no limit on how long an unwed father may wait to demonstrate his interest (*id.* at 11), that the court has eliminated the strict 30-day bright line in the Illinois Adoption Act (*id.* at 13), and that the ruling below will permit "the next infant's unwed father [to] come forward six months later, a year later, two years later" (*id.* at 14).

explicitly on his conduct *prior* to learning of his son's placement with the Does as a measure of his interest in the child: "The finding that the father had not shown a reasonable degree of interest in the child is not supported by the evidence. In fact, he made various attempts to locate the child, all of which were either frustrated or blocked by the actions of the mother." App. 3. (sup. maj.), App. 14 (sup. conc.). The court's judgment of Mr. Kirchner's fitness thus rested not on his response to learning about the fate of his son *after* the thirty-day period had expired, but rather on its measure of Mr. Kirchner's interest in his son, as reflected by his actions *within* the thirty-day period delineated in section (D)(1). Accordingly, there is simply no basis whatsoever for reaching the dramatic conclusion that the court below has failed to respect the thirty-day rule of section (D)(1) and has thereby opened the door to indefinite challenges to final adoption orders by fathers who learn years later about the adoption of their children.

b. Mr. Edgar also misunderstands the fundamental nature of the specific test of unfitness described by the section (D)(1), which measures the extent to which a parent's conduct during a specified period of time demonstrates a reasonable degree of interest in the child. By analogizing to the type of bright-line rules embodied in the paternity registration statutes at issue in *Lehr v. Robertson*, 463 U.S. 248 (1983), and the other cases cited in his brief (*Amicus* Brief at 18-20), Mr. Edgar confuses the objective standards applicable to such statutes – requiring the performance of specific acts such as the filing of a claim of paternity with a registry – with more subjective measures of a parent's intent. States may clearly adopt

both types of rules, as indeed Illinois has done. *Compare* section (D)(1) *with* section D(n)(2)(i), 750 ILCS 50/1(D)(n)(2)(i) (permitting a finding of unfitness against an unmarried father who fails to file a paternity action after being informed he is the father of a child).[2] However, the statute at issue here, as interpreted by the Illinois Supreme Court, clearly calls for a measure of the parent's interest in the child during a specified period of time, as reflected by the parent's conduct. The Illinois Supreme Court justifiably rejected the argument that section (D)(1) can only be satisfied by the performance of certain specific acts, recognizing that obstacles beyond Mr. Kirchner's control dictated the manner in which he was forced to demonstrate his interest in his son during the first thirty days of his life. App. 2-3 (sup. maj.), 12-15 (sup. conc.). This judgment reflects neither a misunderstanding of the difference between two distinct types of standards applicable to different aspects of the termination process, nor an unwillingness to enforce "bright-line" rules defined by the legislature.

3. In a similar vein, Mr. Edgar also misconstrues the significance attributed to this Court's decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), by the court below. Mr. Edgar seems to argue that the Illinois Supreme Court's unwillingness, in judging Mr. Kirchner fit, to misapply the type of strict presumption against paternity upheld in *Lehr* can only have derived from a misunderstanding of this Court's decision in *Stanley*. Relying only on Justice

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[2] Subsequent to the Illinois Supreme Court's decision in this case, the Illinois legislature enacted a law creating a paternity registry comparable to the registry at issue in *Lehr*.

Heiple's brief citation to *Stanley* in his opinion in support of the denial of rehearing, Mr. Edgar wrongly concludes that the court below somehow understood *Stanley* to preclude states from placing any limit on the right of a long-absent parent to challenge a final order of adoption. *See Amicus* Brief at 6-7.

a. First, Mr. Edgar's understanding of the Illinois Supreme Court's view of *Stanley* is pure conjecture, since the opinion of the court (App. 1-4) makes no mention of *Stanley*, or any other federal precedent, in concluding under state law that Mr. Kirchner is fit. Even with respect to the denial of rehearing, Mr. Edgar (like Petitioners) fails to recognize that no other Justice joined in Justice Heiple's opinion in support of his vote to deny rehearing, and his opinion thus cannot be fairly described as the opinion of the court even with respect to the application for rehearing.

b. Second, no basis exists in reason or in the record for ascribing to Justice Heiple individually – much less to the court as a whole – the wild understanding of *Stanley* described by Mr. Edgar. In fact, Justice Heiple cites to *Stanley* only to support the unremarkable notion that when a father's right to participate in an adoption proceeding has been established under state law, as was undeniably the case here, he must be found unfit before his rights may be terminated.[3] Mr. Edgar's treatment of *Stanley* reflects a basic lack of understanding between the

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[3] At the page cited by Justice Heiple, the opinion in *Stanley* states simply that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children may be removed from their custody." 405 U.S. at 658.

type of "bright-line" tests for establishing paternity sanctioned by this Court in *Lehr*, and processes applicable to the termination of parental rights that have been recognized under state law, which processes were at issue in *Stanley*. In *Lehr*, this Court made clear that in determining when a putative father has established a right to be notified of and participate in an adoption proceeding, states may permissibly distinguish between unmarried fathers and unmarried mothers and may apply strict rules to deny rights to a putative father who has failed to take statutorily-defined steps to establish parental rights, such as filing a claim with a paternity registry. 463 U.S. at 266-67. However, this case raises no such issue, since Mr. Kirchner's paternity and his right to contest the adoption of his son were conclusively established in the trial court and have not been challenged on appeal. There is simply no basis for Mr. Edgar's attempt to read into the court's judgment as to Mr. Kirchner's fitness an unwillingness to respect strict statutory limits on when and under what circumstances a putative father may assert parental rights, consistent with *Lehr*.

4. Finally, even apart from his mistaken factual premises and his misunderstanding of basic adoption law, Mr. Edgar's essential argument that the decision below is inconsistent with state public policy favoring finality in adoptions is notably distinct from the principal issue presented for review by Petitioners, which focuses on the claim that Petitioners are entitled to constitutional protection of their relationship, despite the absence of a proper finding of unfitness against Mr. Kirchner. As an *amicus curiae* whose interest in this case stems solely from his personal view of the proper application of Illinois law

by the Illinois courts, Mr. Edgar has no standing to raise issues for review not described in the Petition. Thus, even had Mr. Edgar raised a federal issue that might be appropriate for review, he cannot cure the defects in the Petition itself.

CONCLUSION

For the foregoing reasons, Respondent Otakar Kirchner respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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